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IN THE

Supreme Court of the United States

No. 95

RAILROAD RETIREMENT BOARD, ET AL.,

Petitioners,

vs.

DUQUESNE WAREHOUSE COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

No. 103

DUQUESNE WAREHOUSE COMPANY,

Petitioner,

vs.

RAILROAD RETIREMENT BOARD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia

BRIEF OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS IN NO. 95, RESPONDENTS IN NO. 103.

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STATEMENT OF THE CASE

These cases come before the Court on writs of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit (as to No. 95), and the United States Court of Appeals for the District of Columbia (as to No. 103). In these two cases, the Duquesne Warehouse Company has challenged two decisions of the Railroad Retirement Board holding that Duquesne is and

has been an employer within the meaning of the Railroad Retirement Act and the Railroad Unemployment Insurance Act, respectively. These two statutes define the word "employer" in the same words. The two decisions of the Board are based on the same record. Accordingly, the cases are identical in both their legal and factual backgrounds.

The case designed to set aside the Board's decision under the Railroad Retirement Act was filed in the United States District Court for the Southern District of New York, and the other case, in the United States District Court for the District of Columbia. In each case, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and its President, George M. Harrison, intervened as parties defendant. Each District Court entered judgment for the plaintiff in the case before it. The opinion of the New York District Court is reported in 56 Fed. Supp. 87, that of the District Court for the District of Columbia is not officially reported. See page 282 of the record in No. 95, and page 71 of the record in No. 103. Appeals were taken from both decisions by the original and intervening defendants. The decision of the United States District Court for the Southern District of New York was sustained by the United States Circuit Court of Appeals for the Second Circuit, Judge Frank dissenting, 148 F. (2d) 473. The decision of the United States District Court for the District of Columbia was reversed by the United States Court of Appeals for the District of Columbia in a unanimous opinion reported in 149 F. (2d) 507. This Court has ordered the cases consolidated for the purpose of briefing and argument.

STATEMENT OF FACTS

The Duquesne Warehouse Company is a Pennsylvania corporation, all of whose capital stock is owned by the Pennsylvania Railroad Company. (R. 59-61, 108, and 133.)* It operates two warehouses, one in Pittsburgh, Pennsylvania, and the other at a point known as East Liberty, Pennsylvania, which, however, is also within the Pittsburgh city limits. Both warehouses are located in buildings owned by the Pennsylvania Railroad Company and in each, the railroad operates a freight agency of its own.

At the East Liberty warehouse, Duquesne handles as its only commodity bulk sugar. All of this comes to it in carload lots over the Pennsylvania rails and leaves in the same manner. (R. 61, 108, 134.) Much of the storage is conducted under so-called "storage-in-transit" privileges, which are accorded to shippers under railroad tariffs filed with the Interstate Commerce Commission by the Pennsylvania Railroad. (R. 61-2, 135-6.)

Storage in transit privileges are utilized by shippers who buy commodities in bulk but who cannot immediately use or sell such commodities at one time or place. They therefore frequently desire to suspend the movement of their goods and store them at some convenient point. At a later date the movement can then be resumed to points and at times to suit the shippers' convenience. By virtue of the storage-in-transit privilege, a shipper pays only the rate for through shipment from point of origin to point of final destination instead of the larger sum of the two rates from originating to storage point and from storage point to destination.

As to the East Liberty warehouse, the sugar arrives

*Unless otherwise noted, all record references are to the record in No. 95.

consigned to the owner in care of Duquesne and is shipped out consigned to the owner under bills of lading marked "Accorded Transit Privileges at East Liberty." (R. 134, 170, 181.) The unloading and reloading of the sugar from and to railroad cars is done by Duquesne. (R. 61, 109, 134-5.)

The Pittsburgh warehouse is operated in a manner similar to that in effect at East Liberty. The freight handled at Pittsburgh, however, consists in general commodities. Ninety-five per cent of it arrives at the warehouse via Pennsylvania railroad tracks and most of it leaves in the same manner, although some is shipped out by truck. (R. 108, 136-7.) Carload freight is handled in the same manner as that prevailing at East Liberty as far as loading and unloading are concerned, but less-than-carload freight is unloaded from and loaded into railroad cars by the railroad company at its freight station (located in the building), and Duquesne picks it up and delivers it there.

In addition to the above, the services of Duquesne are utilized by the Pennsylvania Railroad in the reconditioning and disposing of unclaimed or damaged freight. These services are rendered on a commission basis; Duquesne receiving as its compensation its expenses plus ten per cent of the sales price.

THE ISSUES INVOLVED

The Railroad Retirement Act and the Railroad Unemployment Insurance Act each contains the following definition of the term "employer":

> "The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any

> equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *." (U. S. C. Title 45, Section 228a (a), and U. S. C. Title 45, Section 351 (a).)

Subsection (m) referred to above (Subsection (b) in the Railroad Unemployment Insurance Act) reads thus:

> "The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act."

There is no question but that Duquesne is not a carrier subject to Part I of the Interstate Commerce Act. Likewise there is no question but that it is a corporation owned or controlled by such a carrier. The sole question in the case is that of whether the services performed by it are services "in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or handling of property transported by railroad."

The Railroad Retirement Board has ruled that they are such services. In reaching this conclusion, it has applied a standard long ago formulated by it and used in many other cases to the effect that services reasonably closely related functionally or economically to the transportation, receipt, transfer in transit, storage or handling of property transported are to be considered as rendered in connection therewith, and hence within the purview of the Act.

The prime basis of Duquesne's attack on the Board's decision lies in its challenge of the propriety of the standard just stated. In the opinion of the Second Cir-

cuit, Duquesne's position is said to be that "the words of the statute, 'in connection with the transportation of property by railroad or the receipt, delivery, etc., of property transported by railroad' require that the acts, which the statute sets out as definitive, *be done by, or for, the carrier in discharge of the carrier's obligations, imposed upon it, by law or by contract, in connection with its transportation of the property, that is, while the carrier's obligations are in course of being performed*" (R. 477, emphasis supplied). As we understand this contention, it can mean only that the services contemplated are those which form a part of transportation itself as defined in the Interstate Commerce Act and which, if performed by a carrier, would form a part of its duties as such to the public. Thus, the first and probably the most important issue in the case is that of whether the statutory language should be interpreted as including services reasonably closely related to the transportation, storage, etc., of property transported by railroad, or whether, on the other hand, it was the intent of Congress to import into these statutes the technical distinctions of the Interstate Commerce Act and limit the services covered to those which, if performed by a carrier, would be subject to regulation under that statute.

The case presents a second issue which is as follows. Even if it be assumed that the Board has not interpreted the statutes correctly, that an intimate relationship with the transportation, storage, etc., of property is insufficient under the statutes, and that the Acts contemplate only those services which, if rendered by a carrier, would constitute transportation under the Interstate Commerce Act, do the services of Duquesne not even then fall within the statutory definition.

The third issue in the case involves the propriety of the Board's application of the statutes, as interpreted

by it, to the facts of these cases. This we understand to be identical with the issue ordinarily presented in all cases where administrative orders are being subjected to review, and depends for its solution upon the further question of whether there is in the record substantial evidence in support of the administrative decision reached.

OUTLINE AND SUMMARY OF ARGUMENT

In this brief, we will support the position that the decisions of the Retirement Board and that of the Court of Appeals for the District of Columbia should be sustained, because:

I. The Board's interpretation of the statutes is correct, for

A. It Is in Accord with the Statutory Language

The words of the statutes taken in their natural sense contemplate services related to, though not necessarily a part of transportation. They also indicate an intent to include services related to the storage, handling, transferring in transit, etc., of freight transported by railroad, and show on their face no intent to limit the coverage to cases where such services are rendered as a part of transportation itself, or while transportation is in progress.

B. It Is Not Inconsistent with the Legislative History of the Statutes

The legislative history is not employed here to resolve an ambiguity on the face of the statute but to create one which would not have appeared without reference to such history. While conflicting inferences may be drawn from the legislative history, there is more evidence of a

Congressional intent, conforming to the Board's interpretation than there is to the contrary.

C. It Conforms to and Will Accomplish the Purposes of the Statutes

If these acts are construed as including only carrier subsidiaries performing phases of the carrier's duty to the public, as defined in the Interstate Commerce Act, many operations which customarily form a part of the business of railroading may be entrusted to such subsidiaries for performance, thus evading the statutes and thwarting their purpose, which is to subject the railroad business as a whole to special regulation.

D. It Is Supported by a Long and Consistent Series of Administrative Decisions

Early in the history of the administration of these acts, the Board fixed upon the interpretation of the statutes which it applied in these cases and has consistently adhered to it. This administrative interpretation, while not controlling, is entitled to great weight.

II. The interpretation advocated by Duquesne would itself include that company in the statutory coverage.

If the statutes should be interpreted as contemplating only services which, if rendered by a carrier, would constitute "transportation," Duquesne is nevertheless covered, as the type of warehousing performed by it has been held to be a phase of transportation when performed by carriers for themselves.

III. The Board's decision on the facts is supported by substantial evidence and should not be disturbed.

Assuming the correctness of the Board's interpretation of the statutes, it had before it substantial evidence to support its decision. It appeared in the evidence that Duquesne is operating as an integral part of the transportation system of the Pennsylvania Railroad, and that its services constitute a valuable competitive aid to the business of that carrier and an economic service to its shippers.

ARGUMENT

I. The Board's Interpretation of the Statutes Is Correct

A. It Is in Accord With the Statutory Language

The language of these statutes on its face supports the interpretation which the Board has given it. The Circuit Court of Appeals for the Second Circuit has stated in its opinion that "the critical words 'in connection with the transportation of property and of property transported by railroad' are used to denote transit, and cover acts done only by or for the carrier while its obligations persist." This we understand to mean that the only services contemplated by the statutory definition must be themselves a part of the act of "transit" or "transportation," and must be performed at a time contemporaneous with the act of transportation.

We take direct issue with this conclusion. The actual language of the statute "in connection with the transportation * * * or the receipt, * * * transfer in transit, * * * storage, or handling of property transported by railroad" certainly does not indicate in and of itself that a service must constitute a phase of transit or transportation, or

that it must be contemporaneous with such transportation before it can be included. The natural meaning of the words "in connection with" is that of a relationship between two subjects which, while close, is not sufficiently close to amount to actual identity.

Further, there is nothing in the statutory language to indicate that the "services" and the "transportation" referred to are required to be performed at the same time. It is to be noted that the statutes refer to the various services mentioned as having been rendered to "property transported by railroad." As the Court of Appeals for the District of Columbia observed in its opinion, "the participle 'transported' is certainly in the past tense." The only way to make the language of the statute fit the contention of Duquesne and the opinion of the Second Circuit is to change it to read "property being transported." No such alteration of statutory language should be accomplished by judicial action unless clear justification is to be found for it elsewhere in the act or in its legislative history. No other language of the statute can be pointed to as affording such justification, and the legislative history will be considered below.

There is another conclusion, however, which may be drawn from the language of the statutes, but which the Second Circuit failed to consider. The Acts not only refer to services in connection with the transportation of property but specifically to services *in connection with* the receipt, transfer in transit, storage or handling of such property. Insofar as the specific situation of Duquesne is concerned, there can be no question but that it actually receives, transfers in transit, stores, and handles property. There is no question but that such property may be correctly designated as property "transported by railroad." Thus, even if Duquesne were held not to render any services in connection with transportation, it still

renders services in connection with the other functions mentioned, all within the literal and obvious meaning of the words of the statute. Duquesne, however, has attempted to avoid this conclusion by contending that the only accessorial services referred to by the statute are those which a carrier might be required to render as parts of its obligation to perform transportation. In short, it asserts that the words "receipt," "transfer in transit," "storage," and "handling," refer only to special phases of transportation, and are included in transportation itself. It is apparent that such a construction of these statutes reduces the words in question to mere surplusage. If the statutes intended to include only such services as form a part of transportation, that result would have been fully achieved by use of the phrase "services in connection with transportation." The fact that the statutes elaborated by including these other items is therefore in itself proof of the fact that something more than transportation alone or services in connection therewith was meant to be covered.

We conclude, therefore, that an examination of the language of the Acts supports the interpretation of the Board and the Court of Appeals for the District of Columbia, and that of the dissenting judge in the Second Circuit. Taking the words in their obvious and natural sense, they indicate that services were contemplated which were not a part of transportation but only rendered in connection therewith. They further indicate that the effect of the statutes is not limited to the inclusion of services in connection with transportation alone but extends to other services in connection with the receipt, transfer in transit, storage, and handling of railroad-transported property as well. The language of the Acts, therefore, is wholly consistent with the idea that services reasonably closely related to transportation or to the receipt, transfer in transit, storage, or handling of property transported by rail-

road are included. It lends no support to the contention that such services must be a part of transportation or "transit," or a phase of the carrier's duty as such, or that they must be performed while transportation is in progress.

B. The Board's Interpretation Is Not Inconsistent With the Legislative History of the Acts.

The argument by which Duquesne seeks to sustain its position is based on the legislative history of the statutes. This history is said to establish that the language of the statutes was not used in its normal sense but with a special or technical meaning not apparent on its face. Summarily stated, the argument appears to be somwhat as follows: The Railroad Unemployment Insurance Act and the Railroad Retirement Act contain identical definitions of the term "employer" and hence must be presumed to have the same coverage. This is not denied.*

It is further contended that the definition of the term "carrier" in the Railway Labor Act, an earlier statute, is so nearly the same as that of the term "employer" in the other Acts mentioned above as to lead to the conclusion that the one was adopted from the other. This, too, is conceded.** The final step in the argument is that the word

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* In fact, the report of the House Committee recommending the passage of the Railroad Unemployment Insurance Act stated: "The bill provides for a system of unemployment insurance for the same employees as are covered by the Railroad Retirement Act of 1937, and the support of such system of unemployment insurance through contributions collected from the same employers as are subject to the Railroad Retirement Act of 1937." (House Report No. 2668, 75th Cong., 3d Session.) This report was adopted verbatim by the Senate Committee in its Report No. 2164, 75th Cong., 3d Session.

** The Railway Labor Act provides: "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. * * *." (Section 1, First, U. S. C. Title 45, Section 151, First.)

"transportation" and the phrase "receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad" were borrowed almost verbatim from Section 1(3) of the Interstate Commerce Act, and hence are to be accorded only the weight given them in the application of that statute. This is said to be limited to the duties of a carrier, as such, to the public. Under this interpretation, the only purpose attributable to the Railway Labor Act and the statute now before the court would be that where carriers have entrusted to companies controlled by themselves the performance of some portion of their obligations to the public, then and then only would the statutory definition be applicable.

Such a conclusion certainly does not follow as a matter of law. It is, of course, recognized that statutes in *pari materia* are to be construed together and that the same or similar language in such statutes should normally be given the same interpretation. The Interstate Commerce Act and the various railroad labor statutes are not in *pari materia*, however. They do not form parts "of a homogeneous whole, of a common system." (*Louisiana vs. Mississippi*, 202 U. S. 1, 41.) Their subject matter is wholly different. The Interstate Commerce Act regulates the relationship between carriers and the public. Its original purpose was that of prohibiting discriminations. This purpose was subsequently expanded to include the ensuring of an adequate and sound transportation system, but in either case the provisions of the statute were directed to the obligations of the carriers to those using their facilities. The labor statutes, however, regulate the relationships between carriers and their employees. They seek to minimize labor disputes and improve employee morale. Their subject matter and aims are thus wholly different from those of the Interstate Commerce Act. It is true that

they constitute regulations of the business of railroading, but all such regulations are not to be considered as parts of one general regulatory system. This was made clear by the case of *United States vs. Colorado and North Western Railroad Company*, 157 Fed. 321, 330, where the court, in considering the relationship between the Interstate Commerce Act and other federal statutes designed to regulate phases of railroad activities, said:

> "The rule in *pari materia*, which counsel for the company invoke, the rule that the similar terms of statutes enacted for like purposes should receive like interpretations, is inapplicable to the Interstate Commerce Act and the safety appliance acts, because the provision of the latter relative to the question before us is plain and explicit, and a statute falls under that rule only when its terms are ambiguous or its significance is doubtful (Endlich on Interpretation of Statutes, Sec. 53, p. 67), and because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different. It is true that each act was a regulation of interstate commerce, but so are the Sherman Anti-Trust Act, the Employers' Liability Act, the various acts regulating the inspection of steamboats, and the navigation of the inland rivers, lakes and bays, and many other acts, too numerous to mention or review. It does not follow from the facts that the Interstate Commerce Act was first passed, and that it regulates commerce among the states, and declares that its provisions shall apply to the members of a certain class of carriers engaged therein, that the Sherman Anti-Trust Act, the Safety Appliance Acts, and other subsequent acts regulating commerce apply to the members of that class only, in the face of the positive declarations of the later acts that they shall govern other parties and other branches of commerce. The subject of the first act was the contracts, the rates of transportation of articles of in-

terstate commerce; the subject of the Safety Appliance Acts was the construction of the vehicles, the cars, and engines which carry that commerce. The evils the former was passed to remedy were discrimination and favoritism in contracts and rates of carriage; the evils the latter was enacted to diminish were injuries to the employes of carriers by the use of dangerous cars and engines. The remedy for the mischiefs which induced the passage of the former act was equality of contracts and rates of transportation; the remedy for the evils at which the latter act was leveled was the equipment of cars and engines with automatic couplers. Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in *pari materia* should have similar interpretations ought not to govern their construction."

Not only are the general purposes of the Interstate Commerce Act and the labor statutes wholly different, but the language here under consideration was used by them in entirely different contexts. The coverage of the Interstate Commerce Act is limited to carriers and their basic function, which is the furnishing of "transportation." Transportation is defined in Section 1(3) as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Section 1(4) of the Interstate Commerce Act makes it the duty *of carriers* to furnish such transportation. Thus, the concept of transportation was necessarily linked with that of the carrier's duty to the public.

The labor statutes, on the other hand, do not use the terms last above quoted in reference to the duties of carriers at all, but as a basis of fixing the coverage of carrier owned or controlled companies which were not covered by

the Interstate Commerce Act. It is apparent, therefore, that the purpose underlying the use of the language in question was wholly different in the labor acts from that which prompted its use in the Interstate Commerce Act and there is no logical basis for concluding that any technical or limited significance which has become attached to it in reference to carriers under the one act should be carried over and applied to carrier owned or controlled companies under the other.

If any such carrying over is to be established, it cannot accordingly be shown from the words of the statutes or from any legal principle of statutory construction because the statutes themselves are not in *pari materia*. Such a carrying over, if it was contemplated at all, must depend upon the legislative history of the statutes.

As noted above, the statutory language under consideration originated, as far as the labor statutes are concerned, with the Railway Labor Act. The Railway Labor Act was originally enacted in 1926 but the language in which we are interested was not incorporated into the statute until 1934, when extensive amendments were adopted. For the sake of reference it should be noted that the original definition of the term "carrier" in the Act of 1926 read as follows:

> "The term "carrier" includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, including all floating equipment such as boats, barges, tugs, bridges and ferries; and other transportation facilities used by or operated in connection with any such carrier by railroad * * *."

Whether this language was intended to cover carrier subsidiaries is doubtful and this portion of the statute has never been judicially interpreted.

When the amendments of 1934 were proposed, Mr.

Joseph B. Eastman, at that time Federal Coordinator of Transportation under the Emergency Transportation Act of 1933, and also a member of the Interstate Commerce Commission, was instrumental in drafting the bill. Mr. Eastman appeared before the Interstate Commerce Committees of both Houses of Congress to explain and support it. The original bill (S. 3266, 73d Congress, 2d Session) contained the following proposed definition of the term "carrier":

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, any company operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such carrier." (Hearings before the Committee on Interstate Commerce, U. S. Senate, 73d Cong., 2d Sess., S. 3266, p. 1.)

In explaining the meaning intended to be expressed by this language, Mr. Eastman made the following statement:

> "In the paragraph of Section 1 marked 'First,' there is a change in the present definition of the term 'carrier.' This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occasion contracted out their maintenance work on equipment and even on way and structures.

The thought is that concerns which function in this way as an integral part of the railroad transportation system should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves and as the express and sleeping-car companies. This object is attained by including in the definition of 'carrier' any company 'operating any equipment or facilities or furnishing any service included within the definition of the terms "railroad" and "transportation" as defined in the Interstate Commerce Act.' Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose.

"I may say that in reading that over last night I am not sure the language does cover all companies to which railroads on occasion have contracted out their maintenance work, and it perhaps should be examined rather carefully from that point of view.

"The Chairman. I am impressed with the fact that instead of defining the terms in this bill you have defined them as defined in some other bill.

"Mr. Eastman. Yes.

"The Chairman. That is rather poor legislation, isn't it, generally?

"Mr. Eastman. Well, the definitions in the Interstate Commerce Act are, of course, definitions of long standing.

"The Chairman. I am not objecting to it, I am wondering if they should not be written into this bill.

"Mr. Eastman. That might, perhaps, be better. Some paraphrasing would have to be done if that were done in that way.

"The Chairman. The very fact it would have to be done is a reason that it should be done. If you define the terms of one act by another act, everybody has to dig it up.

"Mr. Eastman. I am not sure the language as it stands does cover all that it is intended to cover. I shall be glad to give it further consideration, and

to indicate later any changes which I think ought to be made." (*Ibid.*, pp. 10-11.)

It is entirely clear from the above statement that Mr. Eastman intended to include companies performing certain services for railroads. Refrigerator car companies and companies performing maintenance service on railroad way and equipment were specifically mentioned. It is to be noted that maintenance of way and maintenance of equipment are not services mentioned by the Interstate Commerce Act as included in "transportation" or which carriers might be required to supply on demand to a passenger or shipper. While undoubtedly carriers owe to the public a general duty to maintain their property in a safe condition, no shipper may proceed beyond that point or demand that any specific act of maintenance should be performed for him. These services are not such that discrimination among shippers could arise. Thus, it is questionable whether maintenance of way and equipment services form parts of "transportation" as defined under the Interstate Commerce Act.* If they do not then the original definition proposed to be incorporated into the Railway Labor Act was intended to go farther in its coverage than did the Interstate Commerce Act, as shown by Mr. Eastman's express statements.

The consideration which Mr. Eastman suggested was evidently given, for at a later date, Mr. Eastman appeared again before the Senate Committee and proposed an amended definition. We quote further from the Committee proceedings:

"* * * the chairman has made a valid criticism of the definition of 'carrier' now in the bill, because it

*It is now being contended in two cases, Despatch Shops, Inc., vs. Railroad Retirement Board, which will be further noted below, that transportation under neither the Interstate Commerce Act, the Railroad Retirement Act, nor the Unemployment Insurance Act includes maintenance of equipment services.

requires reference to another act. I can also see difficulties in bringing in trucking operations and certain other operations performed for railroads by outside companies, because of possible conflicts with N. R. A. codes. It is difficult to know just where to draw the line. I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation. So changed, the definition would read:

"'The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.'

"That I may say, is some of the language in the Interstate Commerce Act.

"The Chairman. Is there some difference, however? Isn't this reference here to parent, subsidiary, and affiliated, new?

"Mr. Eastman. Yes. I am confining this now to the railroad subsidiaries because of the possible conflict with N. R. A. codes if we get into the outside field." (Pp. 145-146, Hearings before the Committee on Interstate Commerce, U. S. Senate, *supra.*)

Mr. Eastman also appeared before the Interstate Commerce Committee of the House of Representatives, and made the following additional statement as to the meaning of the amended definition which had been submitted by him to the Senate. After quoting the language of the definition, he said:

"'Now, summing that up, it includes with those carriers subject to the provisions of the Interstate

> Commerce Act, *i.e.*, all railroad companies and express companies, and all companies which are directly or indirectly owned or controlled by the railroads and which perform service or furnish facilities in connection with transportation service performed by the railroads, and the definition includes words descriptive of such transportation service which are taken from the provisions of the Interstate Commerce Act." (P. 17, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Cong., 2d Session, on H. R. 7650.)

And further:

> "The definition in this bill, H. R. 9689, makes it clear that all transportation service, as defined by the Interstate Commerce Act, whether performed directly by a railroad or indirectly by a subsidiary company, shall be subject to the provisions of the Railway Labor Act."

The first of these two statements is in part a paraphrase of the statutory language and to that extent is not particularly helpful in determining the intent. The second quotation appears to lend some support to the contention that only "transportation service" was intended to be covered by the statute. It is true that Mr. Eastman stated that "all transportation service" was included. He did not state, however, that *only such services* were covered. This fact, when taken in connection with the further intent expressed by him to the Senate Committee to include contractors performing services whose status under the Interstate Commerce Act is doubtful, leads to the conclusion that his statement was intended by him as being illustrative and not as expressing the maximum coverage possible under the statute.

Only slight modifications were made in the proposed definition last above quoted before the passage of the

Railway Labor Act. The final definition of the enacted statute reads as follows:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.". (U. S. C. Title 45, Section 151, First.)

The only noteworthy feature of the final definition is that it expressly excluded "trucking service" from the coverage provided. This leads to the conclusion that such service would have been included in the general definition had this exclusive language not been used. It has, however, been held that in general, trucking service is not a transportation service under the provisions of Section 1(3) of the Interstate Commerce Act. See *Interstate Commerce Commission vs. Detroit, Grand Haven and Milwaukee Railway Company*, 167 U. S. 633. If the Railway Labor Act was intended to include only such services as were embraced within the Interstate Commerce Act, the specific exclusion of trucking service is difficult to understand.

Insofar as the Railway Labor Act is concerned, this concludes the legislative history in relation to its employer coverage. At the time when this statute was before Congress, however, there were also under consideration several bills proposing the establishment of a retirement system for railroad employees. The consideration of these bills ultimately led to the enactment of the Railroad Retirement Acts of 1934 and 1935, both of which contained

definitions of employers covered which were substantially the same as the definition of a "carrier" set forth in the Railway Labor Act.* Insofar as we have been able to ascertain from the Committee hearings, these definitions were adopted without any discussion as to the significance of the language used.

When the Railroad Retirement Act of 1937 came before the Congress, however, the matter of the scope of the coverage of the Act as to employers was given consideration. Mr. George M. Harrison, in explaining the terms of the bill before the House Committee on Interstate Commerce, stated as follows:

> "Now Section 1 might be referred to as the scope of the legislation. Section 1 makes the bill applicable to those that are defined in that section as employers: Now the employers defined in Section 1 are express companies, sleeping-car company, or carrier by railroad that are subject to part I of the Interstate Commerce Act, and in addition thereto it is proposed to include as employers any company which may be directly or indirectly owned or controlled by the express company, the sleeping-car company, or railway company, or under common control by one or more of such companies, when those companies are engaged in the business of transporting passengers or property for the rail-

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* "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad." (Sec. 1a, Act of 1934, 48 Stat. 1283.)

"The term 'carrier' means any express company, sleeping-car company or carrier by railroad subject to the Interstate Commerce Act, and any company owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any services (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or handling of property transported by railroad." (Sec. 1a, Act of 1935, 49 Stat. 967.)

road or other service that is a part of railway transportation, such as grain elevators, private car lines, refrigerator car companies, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of these previously identified employers which are, express companies, sleeping-car companies, or carriers by railroad." (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong., 1st Sess., on H. R. 6956, page 17.)

The scope of the bill was further stated by this witness in the course of the Senate Committee Hearings, as follows:

"* * * the bill will embrace in its scope all common carriers by railroad, express, or Pullman companies that are subject to part I of the Interstate Commerce Act, and in addition thereto such companies as may be owned, in whole or in part, or in or under the control of one or more of the railroads, express, or Pullman companies when and if such companies are engaged in the transportation of passengers or property by railroad." (Hearings before the Committee on Interstate Commerce, U. S. Senate, 75th Cong. 1st Session on S. 2390, pages 17-18.)

The Senate Committee Report on the bill contains the following significant summary as to the scope of the proposed measure:

"The present act embraces within its scope 'any company which may be directly or indirectly owned (by a carrier) or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, trans-

fer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of and operating the business of any such "carrier".' This language has been clarified to make it clear that coverage extends to a company which is owned or controlled in common by several companies. Exclusions have been extended to casual service and the casual operation of equipment or facilities. In addition to trucking service, it is intended to exclude employees of a contractor who may, for example, be occasionally employed by a 'carrier' to repair a depot or build a bridge. Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or *de facto*. *De facto* control may be exercised not only by direct ownership of stock, but by means of agreements, licenses, and other devices which insure that the operation of the company is conducted in the interests of the carrier.

"By these changes there are brought within the scope of the act substantially all those organizations which are *intimately related to the transportation of passengers or property by railroad in the United States.*" (Report of Senate Committee on Interstate Commerce No. 697, 75th Cong. 1st Sess., page 7.) (Emphasis supplied.)

Two points are noteworthy in connection with this report. In the first place, words were inserted which, as the Committee stated, were intended to exclude companies employed by carriers "to repair a depot or build a bridge." Certainly such operations form no part of transportation under the Interstate Commerce Act, and if it had been the underlying purpose of Congress to limit the coverage of the new statute to such "transportation," the exclusion referred to would have been unnecessary.

Equally significant is the committee's statement that

it was the intent of the Act to cover those organizations "intimately related" to transportation. This we understand to be substantially the criterion which the Railroad Retirement Board has adopted but which is so vigorously challenged in these cases.

When the Railroad Unemployment Insurance Act was passed, it was as above noted, the expressed intent of Congress to cover exactly the same employers as were covered by the Retirement Act. Naturally enough, therefore, the legislative history of the Unemployment Insurance Act sheds no further light on the question of employer coverage.

Summary. Where the language of a statute is ambiguous, it is well established that resort may be had to its legislative history as an aid to interpretation. If the legislative intent is made apparent from the history, it will frequently be conclusive.

In these cases, however, the language of the statutes themselves is clear. The only doubt in regard to the interpretation arises from the contention which has been made that the definitions and distinctions of the Interstate Commerce Act are to be imported into the labor statutes. This contention is based on the legislative history which has thus been used to create rather than resolve an ambiguity. This fact alone is sufficient to justify the Court in refusing to consider the legislative history at all.

In addition to the above, however, we have pointed out that the history of these statutes does not establish the existence of any intent to include only such services as form parts of transportation subject to the Interstate Commerce Act. References to maintenance and trucking services and to contractors who may repair a depot or build a bridge point to a contrary conclusion, the status

of all such services as "transportation" under the Interstate Commerce Act being certainly questionable. Further, in this connection, we find in the language of the report of the Senate Committee considering the Retirement Act a statement to the effect that it was the purpose of Congress to bring into the purview of the statute those companies performing services "intimately related to * * * transportation." This language is certainly inconsistent with any thought that Congress meant to limit the established coverage of these statutes to companies actually engaged in transportation.

Considered from a point of view as favorable as possible to the position taken by Duquesne, the most that can be said for the legislative history is that conflicting conclusions may be drawn from it. It hence affords an insufficient basis for determining Congressional intent, even were the expressions of that intent in the statutes themselves ambiguous. Where there is in fact no ambiguity in the language of the statutes, it follows even more clearly that the legislative history affords no foundation for Duquesne's contention.

C. The Board's Interpretation Conforms to and Will Accomplish the Purpose of the Statutes

As we have seen, the railway labor statutes employ substantially the same definitions of the terms "carrier" or "employer." This identity of definition is natural when we consider the purpose common to all of preventing the deterioration or disruption of commerce due to labor unrest resulting either from unsettled disputes with employers or from the failure of the industry to provide a means for meeting the problems of superannuation and unemployment.

The employer coverage provisions have a definite

relationship to this purpose, a relationship revealed by experience under earlier statutes. As above noted, the Railway Labor Act of 1934 was an extensive amendment of the earlier Railway Labor Act of 1926, which, in turn, supplanted the Transportation Act of 1920.

The Railway Labor Act of 1926 and the Transportation Act both included carriers in their employer coverage, but neither purported to cover carrier subsidiaries rendering services in connection with transportation. This omission gave rise to serious difficulties in connection with the administration of these statutes. A substantial number of the carriers created subsidiary corporations which they controlled by one means or another, turned over to these corporations various services theretofore carried on by the carriers themselves, and asserted that these new companies and their employees were no longer subject to the regulatory statutes operating in the railroad field.

The Transportation Act was administered by a body known as the United States Railroad Labor Board. Early in the history of that tribunal it had occasion to consider the problem presented by these subsidiary corporations in the case of *Railway Employes' Department, A. F. of L., vs. Indiana Harbor Belt Railroad Co.*, 3 U. S. R. L. B. 332. In its opinion, the Board roundly condemned this whole procedure, saying:

> "The object of the transportation act was to prevent interruption to traffic, growing out of disputes between carriers and their employees. Such controversies had for years periodically harassed the public, blocked commerce, stagnated business, destroyed property values, and visited great inconvenience and suffering upon millions of people. At a time when our country was in no condition to undergo further repetitions of such unfortunate experiences and when they were possible on a

much larger scale than ever before, Congress endeavored to provide a method for the adjustment of railway labor troubles. In the transportation act, 1920, the Government enjoins upon all carriers, and their officers, employees, and agents, the duty to 'exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier, growing out of any dispute between the carrier and the employees or subordinate officials thereof.' Elaborate provisions are made in this act for conferences between the parties for the settlement of disputes, and, in the event of a failure to agree, for the hearing and decision of them by adjustment boards and by the Railroad Labor Board.

"When Congress in this act speaks of railroad employees it undoubtedly contemplated those engaged in the customary work directly contributory to the operation of the railroads. It is absurd to say that carriers and their employees would not be permitted to interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors, in which event the so-called contractors and the railway workers might engage in industrial warfare ad libitum." (Page 337.)

The Railroad Labor Board had no power to enforce its decisions (*Pennsylvania R. Co. vs. U. S. R. L. B.*, 261 U. S. 72; *Pennsylvania R. System, etc., vs Pennsylvania R. Co.*, 267 U. S. 203), and its rulings as to subsidiary companies were generally ignored by the carriers. In fact, only about six weeks after the decision in the Indiana Harbor Belt case, the Board announced that it had facts in its possession indicating that its orders had been violated by 25 carriers through the device of "contracting out" railroad work, and cited these carriers to appear before it in relation to a threatened strike of railroad shopmen. (3 U. S. R. L. B. 1137-1139.)

The efforts of the Labor Board to adjust the various matters in dispute between the railroad companies and the shop men were unsuccessful and the strike which ensued was the most serious ever to affect the railroad industry. Some 400,000 men left their work. It is generally agreed that one of the major contributing causes was the practice above discussed of contracting out railroad shop work. See Wolf, "Railroad Labor Board," (published by the University of Chicago Press) pages 231-233 and 234; the resolution of the United States Railroad Labor Board above referred to, 3 U. S. R. L. B. 1137, 1138; and a contemporary editorial in the "Railway Age," trade journal of the railroad industry, Vol. 53, page 550.

All of these facts were certainly within the contemplation of Congress when it was proposed to that body that the Transportation Act be repealed and the Railway Labor Act enacted in its place. The first such proposal was made by the railroad employees and took the form of a bill known as the Howell-Barkley Bill. This measure sought to cover carrier subsidiaries by the inclusion of the following language in the definition of "carriers" who were to be subject to its provisions:

> "* * * including all bureaus, associations, committees and institutions of whatever kind or character maintained or supported by or existing in furtherance of the interest of carriers." (Vol. 65, Congressional Record, page 7880.)

Considerable opposition to the Howell-Barkley Bill developed in Congress, and it was never passed. In its place, however, another bill was presented which was a compromise measure accepted by both the railroad companies and their employees, and introduced under their joint sponsorship. This bill, which omitted the language

above quoted, was passed, and became the Railway Labor Act of 1926.

The problem of contracting out work to non-carrier companies was therefore not solved by the Railway Labor Act, but appears to have continued as a live issue.

It is clear that the amendments of 1934 sought to provide a solution for this difficulty by the introduction of the carrier subsidiary provisions. These provisions in the Railway Labor Act and the later statutes should therefore be interpreted in accordance with the need which gave rise to them.

In the case of *National Labor Relations Board vs. Hearst Publications, Inc.*, 322 U. S. 111, the court was faced with the contention that certain persons were not employees but independent contractors under the rules of the common law, and hence should be held similarly to be independent contractors under the National Labor Relations Act. The court declined to adopt this reasoning, holding that the existence of an employment relationship under the statute was to be determined from the situation of the parties in reference to the purposes of the Act, and the evils which it was designed to eliminate, rather than distinctions of the common law devised to meet a wholly different problem. The same reasoning is applicable here where the distinctions of the Interstate Commerce Act are sought to be introduced into the labor statutes.

If the Court should sustain the position of Duquesne and thereby peg the definitions of the Railway Labor Act, the Railroad Retirement Act, the Carriers' Taxing Act and the Railroad Unemployment Insurance Act to those of the Interstate Commerce Act, and specifically to the concept of "transportation" as embodied in that statute, we anticipate that other efforts will be made to establish that various phases of the business of railroad-

ing can be divorced from the coverage of these statutes by the simple device of entrusting their performance to subsidiary corporations which can then be asserted to perform no services within the definition of transportation in the Interstate Commerce Act. That this is no idle fear on our part is evidenced by the fact that other cases are now pending where this result is sought. Two of these cases, entitled *Despatch Shops, Inc., vs. Railroad Retirement Board*, are now before the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the District of Columbia. Both involve the question of whether a carrier subsidiary operating a railroad shop which maintains equipment and manufactures parts and cars for the carrier, performs a service in connection with transportation. Another case, Universal Carloading and Distributing Company vs. Pedrick, is now pending in the United States District Court for the Southern District of New York. It arose under the Carriers Taxing Act (which includes the same definition of the term "employer"), and involves the question of whether a company which performs the same function as a railroad with reference to less-than-carload freight with the exception of the actual haulage, is performing a service in connection with transportation.

How far the tendency expressed in these cases will proceed, we cannot say. We do know, that the business of railroading is such that it depends for its operation on the correlation of many functions widely separated in space and kind. Many of these have been incorporated into the carrier's operations for reasons of economy and efficiency and not because they are actually required in order to comply with the carrier's common law and statutory duties as such. Wherever such a situation exists, there is room for the subsidiary corporation and opportunity for the claim being made that no transportation

is performed by such a company, and that it is hence outside the scope of the labor statutes.

The interpretation of these statutes sought by Duquesne will obviously prescribe limits for the Railroad Retirement Act and the Railroad Unemployment Insurance Act less extensive than that of the actual business of railroading as habitually carried on by carriers and their subsidiaries. How much less extensive these limits might be held to be is a matter of conjecture. No authoritative decision has ever been made regarding the status under the Interstate Commerce Act of many railroad services. There has never been any occasion for such a determination, as these services have not impinged upon the relation between carriers and the public sufficiently to require regulation at the hands of the Interstate Commerce Commission. As to all such, the contentions of Duquesne offer the device of the subsidiary corporation as a means of avoiding the provisions of the labor statutes. No statutory provision should be interpreted in such manner as to thwart any portion of its purpose by encouraging evasion.

On the other hand, the interpretation made of these acts by the Board and by the Court of Appeals for the District of Columbia eliminates this possibility and effectuates the statutory purpose. The Board has held that those services are included within the scope of the acts which are "an integral part of or are closely related to the rail transportation system of a carrier." The Court of Appeals for the District of Columbia has interpreted this standard of administration of the acts as being consistent with the policy of Congress "to cover the business of railroading as it is actually carried on." These interpretations would eliminate carrier owned companies acquired merely for investment purposes whose functions are not expected to contribute to the efficiency

or prosperity of railroad operations. They would include those which are intended to supplement and support the primary business of the carriers.

We conclude, therefore, that the Board's interpretation as sanctioned by the Court of Appeals for the District of Columbia more clearly effectuates the Congressional purpose than does that adopted by the Second Circuit. It does not afford the opportunity for evasion through the artificial agency of subsidiary corporations and it includes in one social security system all those intimately related to the railroad business. This we consider to have been the purpose of Congress.

D. The Board's Interpretation Is Supported by a Long and Consistent Series of Administrative Decisions

The question of the weight to be given by the courts to the Retirement Board's interpretation of these statutes has been the source of sharp disagreement in the opinions of the Courts of Appeals. Much of this disagreement has been occasioned by what we believe to be a misconception of our own and the Board's position. We have not contended and do not understand that the Board has asserted that its interpretation is sacrosanct and immune from reexamination at the hands of the courts. We do contend, however, that where any tribunal has been entrusted with the administration of a statute, where in the course of that administration the tribunal is required to interpret the statute, and where the statute has received at the hands of such tribunal a consistent interpretation over a period of years, that interpretation is entitled to great weight and should not be disturbed unless clearly erroneous. This principle has been so definitely established in the decisions of this Court that lengthy citations of authority are not required to establish it. *Billings vs.*

Truesdell, 321 U. S. 542, 552; *United States vs. American Trucking Association*, 310 U. S. 534, 549; *Norwegian Nitrogen Products Company vs. United States*, 288 U. S. 294, 315.

The present Railroad Retirement Act was enacted in 1937, and almost immediately thereafter, the Retirement Board was faced with the necessity of interpreting and applying the statutory definition of employers. The unique nature of the problem was discussed in the Board's annual report for the year 1938 as follows:

> "The concept of the national system of railroad transportation, which was largely crystalized in the period following the war-time assumption of Federal control, is the joint product of a century of physical and mechanical development and a half century of Federal regulation. Despite the deep historical roots of the concept, railroad retirement insurance legislation for the first time brought about the necessity for ascertaining and identifying its content concretely and with the precision that the term insurance necessarily implies. Regulation in the interest of shippers, the policing of safety legislation, and, even more, the assumption of Federal control, all served to give rise to the concept and to give it content. However, the content derived from these sources is largely embodied in the somewhat narrower conception of 'a common carrier by railroad engaged in interstate commerce.' Nevertheless, for certain regulatory purposes, such as, for example, the acquisition of information and the control of securities issues provided for in sections 20 and 20a of the Interstate Commerce Act, it has long been recognized that the term 'common carrier by railroad engaged in interstate commerce' is not wholly adequate to cover the field.
>
> "The inadequacy of the term was more strikingly revealed in the regulation of employer-employee

> relationships which culminated in the Railway Labor Act. It became apparent that if employer obligations were attributed merely to those entities which are responsible for the discharge of the obligations to the public for carriage, that is, common carriers, it might well prove convenient for employers to avoid the obligations in substantial parts of the transportation industry by providing for the performance of closely related services through entities legally separate yet effectively controlled. Accordingly, the introduction into railway labor legislation of language descriptive of controlled companies performing services related to transportation was a natural step in the historical process by which the conception of the national system of railroad transportation was given definitive expression." (pp. 134-135.)

Thereafter, the Board listed a number of services which it considered to be included, or excluded, as the case might be, and said:

> "Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service; but performance of the usual commercial storage and warehouse business is not." (p. 142.)

Duquesne has made much of this statement in the course of its arguments in the lower courts, and has asserted that it constitutes a holding to the effect that Duquesne is not covered by the Act. It is to be noted that the Board merely stated that a company performing a "*usual commercial* storage and warehouse business" is not included. By this we understand the Board to refer to those companies performing storage and warehouse services for the public at large. The evidence in this case, however, reveals that Duquesne is a captive enterprise in a functional as well as a corporate sense, and

that its relations with the public are limited for the most part to Pennsylvania Railroad shippers who use its services as an adjunct to the act of shipment. We cannot see, therefore, how the Board by such a statement, can be held to have foreclosed itself from deciding that Duquesne is subject to these statutes.

After consideration of the whole problem of employer coverage, the Board, in its regulations issued during the year 1938, fixed upon a standard of decision to govern it in determining whether the services of a given subsidiary company were or were not rendered in connection with transportation, etc. This standard was stated in 20 Code Fed. Reg. 202.7, as follows:

> "The service rendered or the operation of equipment or facilities by persons or companies owned or controlled or under common control with a carrier is in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as common carriers by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad." (Secs. 1, 10, 50 Stat. 307, 314; 45 U. S. C. Sup. III, 228a, 228j.)

The position so stated in its regulations has been consistently followed by the Board in its decisions. Probably its leading case on this point is that of *Lenoir Car Works*, Railroad Retirement Board Law Bulletin, No. 2, page 323, which was decided early in the year 1939. The respondent in that case is a subsidiary of the Southern Railway and operates a large shop wherein the cars of the various rail-

roads going to make up the Southern Railway System are repaired, and where car parts are manufactured. The contention was made that the company was exempt from the provisions of the Act because "the Railroad Retirement Act was designed to apply only to those carrier-controlled companies engaged in operations which are 'parts of transportation'," which is substantially the same contention that Duquesne is making here. The Board's examiner rejected this argument and his report was adopted by the Board in the absence of exceptions. The case is commented on in the Board's Annual Report for 1939, as follows:

> "An important conclusion of law in the examiner's report stated:
>
> "'The operation of equipment or facilities or the performance of a service in connection with the transportation of passengers or property by railroad within the meaning of Section 1(a) of the Railroad Retirement Act is not restricted to operations or services which constitute transportation or practically transportation.'
>
> "Another notable conclusion was that the operation of equipment or facilities or the performance of a service in connection with the transportation of passengers or property by railroad within the meaning of Section 1(a) of the acts, although inclusive of transportation services covered by Section 1(3) of the Interstate Commerce Act, is not limited to such transportation services." (Page 170.)

The basic principles stated in the regulation above quoted and amplified in the *Lenoir* opinion have been followed by the Board in numerous cases thereafter. Certain of these involve carrier owned or controlled warehouse companies performing storage and transit services similar to those of Duquesne. *Baltimore Fidelity Warehouse Company, Railroad Retirement Board Law Bulletin No. 2,*

532; *B. R. & P. Warehouse, Inc., id.* 527; *Terminal Storage Company of Washington, id.* 524; *Lackawanna Terminal Warehouses, Inc., id.* 537.

The same general principles have been applied to other carrier subsidiaries as will be seen from the following cases which have been selected as illustrative. These cases cover telegraph companies (*Great Northwestern Telegraph Company of Canada, Railroad Retirement Board Law Bulletin No. 2,* 385); tie preserving companies (*Santa Fe Tie and Lumber Company, id.* 276); hospital associations (*Chesapeake & Ohio Railway Employees Hospital Association, id.* 211); railroad office building companies (*Southern Pacific Building Company, id.* 371); railroad equipment manufacturing, repair and maintenance companies. (*Oneida Machinery Company, id.* 322); water supply companies (*Beaver Creek Water Company, id.* 550; *Union Pacific Water Company, id.* 546); railroad dining car companies and eating houses (*Fred Harvey Dining Car Operations, Fred Harvey,* and *Fred Harvey Service, Inc., id.* 135, 138 and 140); barge companies (*Kelley's Creek Barge Line, Inc., id.* 13); railroad land companies (*Rock Island Improvement Company, id.* 266); dock and terminal companies (*Alleuez Bay Dock Co., id.* 168, *Long Dock Co., id.* 169). Throughout all of these cases the Board has consistently applied the interpretation of the statutory definition noted above, and has by the use thereof developed a consistent and workable standard for the application of the statutes.

There can accordingly be no question as to the existence of a settled interpretation made by the Board. This interpretation was arrived at only after careful consideration of the nature of the problem before it. Once decided upon, it has been applied consistently throughout the years since its formulation. According to principles of law long settled by the decisions of this court, therefore, the Board's

interpretation is entitled to such weight at the hands of the courts that it will not be set aside unless clearly shown to be contrary to the language of the statute. This we submit has not been established in this case.

Summary as to Statutory Interpretation

We have pointed out above that the interpretation of these acts reached by the Retirement Board is sound and should be sustained, *first*, because it is in accord with and gives full effect to the words of the statutes taken in their natural sense; *second*, because no technical or restricted meaning may be attached to this language by reference to a legislative history which is replete with circumstances indicating that Congress intended to use the language in question in a sense much broader than the alleged restrictions would permit; *third*, because the interpretation advocated by Duquesne will introduce distinctions into the statutes which are foreign to their basic purposes and which will permit evasions as to substantial portions of the ordinary business of railroading, and *fourth*, because the Board's interpretation represents a settled decision as to the meaning of these acts, which decision has been consistently followed.

II. The Interpretation Advocated by Duquesne Would Itself Include That Company in the Statutory Coverage

Up to this point in the brief, we have supported the interpretation made of these statutes by the Railroad Retirement Board. At this point, however, we wish to analyze the argument advanced by Duquesne for the purpose of pointing out that, even under its own contentions, carried to their logical conclusions, that company still falls within the statutory coverage.

As noted above, Duquesne's position depends primarily on the legislative history of the statutes. By reference to certain items therein, it has reached the conclusion that the only services contemplated by these acts are those embraced within the concept of "transportation," as developed in the course of the enactment and administration of the Interstate Commerce Act. Certainly there is nothing in the legislative history or elsewhere which can be pointed to as indicating any intent to establish in the labor statutes a definition of transportation or services in connection therewith more restricted than that of the Interstate Commerce Act.

Inasmuch as "transportation" under the Interstate Commerce Act is considered as a function of a carrier, and in the labor statutes the expression "services in connection with transportation, etc.," is used in reference to subsidiary companies which are not carriers, the only possible logical conclusion of Duquesne's argument is that the labor statutes were intended to include carrier subsidiaries performing services which would constitute transportation under the Interstate Commerce Act *if performed by a carrier.*

The difficulty inherent in the argument is, however, that there is authority for the proposition that warehousing, while not a necessary carrier function, constitutes a phase of transportation if a carrier performs it.

In the case of *American Warehousemen's Association vs. Inland Waterways Corporation*, 188 I. C. C. 13, the Interstate Commerce Commission had before it the question of the legality of certain storage-in-transit operations of a carrier which were alleged to be discriminatory. The jurisdiction of the Commission was challenged on the ground that the operations in question were not a phase of "transportation." The Commission held that it had jurisdiction, saying:

> "It is true that there are certain services, such as warehousing, which, on the theory of the common law, are not common-carrier services and which, in the absence of discrimination, common carriers can not be required to render. Thus in numerous cases we have held that beyond such time as may be required to afford shippers a reasonable opportunity to remove shipments tendered for delivery, storage is no part of the duty of a common carrier; that a carrier is justified, therefore, in imposing such charges for storage as would promote removal of freight from its equipment or premises; and that to that end, it may properly make such charges higher than the actual value of the storage service. *Dakota Monument Co. vs. Director General*, 59 I. C. C. 101; *Plymouth Coal Co. vs. D., L. & W. R. R. Co.*, 36 I. C. C. 76.
>
> "It is well recognized, however, that there are many things which a carrier may voluntarily do which it can not be required to do, and if it holds itself out to and does render storage service in connection with shipments subject to our jurisdiction such service, although not a service which it could be required to perform, is nevertheless included in the term 'transportation' as defined by the Interstate Commerce Act." (Pp. 15-16.)

The same conclusion was stated in the case of *Storage at New London and Thamesville, Conn.*, 190 I. C. C. 213, where it was stated:

> "Protestants take the position that the proposed storage in transit is not a transportation service. It is well settled that storage in transit comes within the meaning of the term 'transportation' as defined in Section 1 of the Interstate Commerce Act." (P. 214.)

This court reached a similar conclusion in the case of *Cleveland, C. C. & St. L. R. Co. vs. Dettlebach*, 239 U. S. 588. The case involved the liability of a carrier for a loss

of goods suffered while in its hands as a warehouseman. The carrier defended on the ground that its liability was limited by a stipulation in the bill of lading by which the shipper had agreed to a small valuation as consideration for securing a reduced rate. The Commission had approved this practice, acting under the Interstate Commerce Act, and its authority so to do was questioned. The court held that the stipulation was valid, and that the transportation subjected to regulation by the Interstate Commerce Act included the service in question, saying:

> "From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term 'transportation,' and subjected to the provisions of the act respecting reasonable rates and the like." (P. 594.)

It follows from these authorities that if Duquesne's present operations were actually being conducted by the Pennsylvania Railroad, there is strong reason to believe that they would be considered as transportation subject to regulation at the hands of the Interstate Commerce Commission. This being true, it follows that even under Duquesne's restricted interpretation of the labor acts, it still would be subject to their provisions.

III. The Board's Decision on the Facts Is Supported by Substantial Evidence and Should Not Be Disturbed

In the prior sections of this brief, we have been concerned with the interpretation of the statutes and the propriety of the standard of decision employed by the Board in this case. If this standard is sustained as legally sound, there remains for consideration the question of whether the actual decision reached by the Board constituted a proper application of it. According to established principles of judicial review, the Board's decision should be sustained if supported by substantial evidence. This principle is prescribed by the Railroad Unemployment Insurance Act, which provides that "the findings of the Board as to the facts, if supported by evidence, and in the absence of fraud, shall be conclusive." (U. S. C. Title 45, Sec. 358(f).)*

While the Railroad Retirement Act does not contain specific language limiting the scope of review of decisions made by the Board thereunder, the same general rule has been consistently applied to it as well. See *South vs. Railroad Retirement Board*, 131 F. (2d) 748, *certiorari* denied, 317 U. S. 701; *Fillers vs. Railroad Retirement Board*, 132 F. (2d) 636; *Gardner vs. Railroad Retirement Board*, 57 F. Supp. 322, affirmed by the Circuit Court of Appeals for the 5th Circuit in April, 1945. The opinion of the Circuit Court is not officially reported, but may be found in C. C. H. Railroad Unemployment Insurance Service, Par. 9465.

There was ample evidence before the Board to establish the existence of a relationship between the services of Duquesne and transportation as conducted by its parent company. The mere fact that Duquesne is owned by a

* It should be noted that Paragraph (f) refers specifically to actions brought by employee claimants or their labor union representatives, but the provisions of the paragraph are elsewhere in the act made applicable to actions of this kind. (Section 358 (c).)

railroad, that its principal officers are officers of the railroad, that its buildings are owned by and leased from the railroad, and that the latter also occupies space therein as freight stations, all affords presumptive evidence of a functional relationship between their operations.

The connection between railroad haulage and the type of warehousing performed by railroads or their subsidiaries has been recognized by this court in the case of *Baltimore & Ohio R. Co. vs. U. S.*, 305 U. S. 507, wherein the court discussed the general situation as follows:

> "Neither the complaints of the competitors of the carriers in the warehousing business nor the terms of the Commission's order are directed at the involuntary storage of goods incidental to transportation. This is the period before or after shipment during which goods occupy cars or floors without any charge above the strictly transportation rate. The warehousing practices complained of are those in connection with accessorial services of the carriers, accurately designated commercial warehousing. Examples of such services are the storage and other warehousing services furnished by the carriers or their affiliates or subsidiaries, to enable shippers to hold and handle their commodities beyond the time allowed by transportation rates and in ways not required by rail movement itself. All of the carriers 'now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies.' This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into

warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages. Obviously a shipper, who can secure transportation, storage, handling and insurance together from a carrier and its affiliates for an aggregate cost which is less than the sum for which he can secure the various services when purchased separately from carriers and non-affiliated enterprises, will deal with those offering the best terms. The storage largely determines the transportation route. To get the rail transportation of large shippers, the carriers sought them out and offered warehousing services and space below the rates of private warehousemen and below the cost to the carriers of the services rendered. It was not only a contest between carriers and private warehousemen but also between the carriers themselves. Traffic departments of the railroads became solicitors for warehousing business. Favored shippers were rented space by the carriers below compensatory figures." (pp. 516-517.)

No contention is made here that the facilities of Duquesne are now being used as a basis of illegal reductions or preferences in freight rates, but the close connection with railroad business which made these practices possible in the past, still exists. There can be no question as to the economic advantage to the shipper of storage-in-transit privileges for he thereby secures the lesser through rate in preference to the sum of two local rates. The fact that the vast bulk of Duquesne's business is conducted for individuals shipping over the Pennsylvania Railroad is evidence of the fact that the railroad has used facilities of Duquesne to give it a competitive advantage, and that the shippers over its lines have found

it desirable to arrange for both the shipment and the storage which they desire, within the limits of one corporate family. The close tie between these two operations is further shown by the fact that these storage in transit arrangements are required to be and are subject to tariffs filed by the Pennsylvania with the Interstate Commerce Commission.

In addition to the storage functions above discussed, the evidence reveals that the railroad utilizes Duquesne as an agency for the disposal of unclaimed or damaged freight, a function closely allied to the railroad's business and which it would have to perform for itself in the absence of a convenient subsidiary agent.

It is submitted, therefore, that the above discussed items of evidence make a substantial showing to the effect that the services of Duquesne are closely related economically and functionally to the transportation services performed by the Pennsylvania Railroad and hence that the Board's conclusion to that effect is sound and should not be disturbed.

CONCLUSION

Summarizing all of the issues discussed in this brief, we have shown:

First, that the interpretation placed upon these acts by the Railroad Retirement Board is sound. It is in accord with their language and cannot be said to be inconsistent with their legislative history. It avoids the difficulty inherent in Duquesne's contention, *i.e.*, that of restricting the operation of the labor statutes to a concept of transportation which arose under the Interstate Commerce Act, a statute having wholly different aims. We anticipate that a sanctioning of such a restriction will constitute an invitation to evasion of all of

the existing railroad labor laws through the device of subsidiary corporations which may be established and made to appear to perform many phases of the normal business of railroading which are not clearly included within the term "transportation." Finally, we have called attention to the fact that the Board's interpretation is not a matter of recent development but that it represents a settled policy substantially as old as the statutes themselves, which has been consistently applied by the Board in such manner as to establish a rational line of distinction between those companies which are covered and those excluded.

Second, we have shown that, even if it be concluded that the only subsidiary companies covered by the labor statutes are those performing services which, if performed by a carrier, will be labelled as transportation under the Interstate Commerce Act, even so, Duquesne would be included, for it has been held that warehousing services may constitute transportation if performed by a carrier.

Third, we have shown that if the legal soundness of the Board's interpretation of the statutes is established, its application of that standard was justified in this case, there being ample evidence to establish the existence of a close relationship between Duquesne's services and transportation.

Respectfully submitted,

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